UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

STEIN, INC.	Case No. 09-CA-214633
Respondent; and	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18	Case No. 09-CB-214595
Respondent; and	
TRUCK DRIVERS, CHAUFFERS AND HELPERS LOCAL UNION NO. 100	
Charging Party.	

RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S BRIEF IN SUPPORT OF EXCEPTIONS (ORAL ARGUMENT REQUESTED)

Pursuant to Section 102.46(a) of the Board's Rules and Regulations, Respondent International Union of Operating Engineers, Local 18 ("Local 18") hereby submits its Brief in Support of Exceptions to Administrative Law Judge Andrew Gollin's January 24, 2019 Decision, and pursuant to Section 102.46(g) of the Board's Rules and Regulations, requests permission to hold oral argument.

Respectfully Submitted,

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I. Introduction

For decades, Respondents Stein, Inc. ("Stein") and the International Union of Operating Engineers, Local 18 ("Local 18" or "Union") have been parties to a series of collective-bargaining agreements ("CBAs") covering slag reclamation work. Pursuant to those agreements, Local 18 was recognized as the duly authorized bargaining agent for Stein employees performing slag in Ohio. In the summer of 2017, Stein announced that it was the winning bidder for slag reclamation at AK Steel Holding Corporation's ("AK Steel") steel manufacturing plant located in Middletown, Ohio ("Middletown Facility"). Previously, slag reclamation work at the Middletown Facility was performed by Stein's competitor, TMS International, LLC ("TMS"), utilizing three separate labor organizations: Local 18, Laborers' Local 534, and Teamsters Local 100. Under TMS, employees were Balkanized in their duties and performed only that work which was specifically allocated to them under their respective CBAs. At all relevant times, TMS employees in the bargaining unit represented by Local 18 constituted a majority of the employees performing slag reclamation work at the Middletown Facility. (*See* Jt. Exh. 1, ¶¶ 17-19.)

The gravamen of this case concerns the Respondents' negotiation and enforcement of a CBA covering slag reclamation at the Middletown Facility, including work that was previously performed by TMS utilizing employees represented by Charging Party Teamsters Local 100. The General Counsel asserts that Stein violated the Act by unilaterally merging the three separate bargaining units into a single bargaining unit operating under a single CBA that recognized Local 18 as the duly authorized bargaining agent for employees performing slag reclamation work at the Middletown Facility. The General Counsel further alleges that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by negotiating and enforcing that CBA because Local 18 did not

represent a majority of employees in the bargaining that was formerly represented by Teamsters Local 100 and as previously recognized by TMS. The ALJ agreed and found that Stein unlawfully merged the three units previously maintained by TMS and Local 18 unlawfully accepted and effectuated representation of the employees in the unified bargaining unit. Under the ALJ's Decision, Local 18's history of collectively bargaining with Stein as the sole and exclusive representative of Stein employees performing slag reclamation work in Ohio was swept away along with the Union's status as the only bargaining representative to establish majority support within the combined unit of employees performing slag reclamation work at the Middletown Facility. Left in its place stands an antiquated system of isolated bargaining units made up of competing factions of employees, two of which represented by the Charging Parties that have failed to demonstrate majority support in the very units they purport to represent.

Fortunately for Local 18, however, the theory of liability supporting both the General Counsel's arguments and the ALJ's Decision is undermined by a failure to establish the critical condition precedent that Stein was obligated to recognize and bargain with the Charging Parties as a *Burns* successor. A threshold requirement for any *Burns* successor's bargaining obligation is that the employees at issue were represented by a union that held a collective-bargaining relationship with the predecessor employer under Section 9(a) of the Act. Here, the General Counsel has not met its burden in establishing that any such 9(a) relationship between Teamsters Local 100 and Stein's predecessors exist. Even if the burden of establishing majority support were set aside, because the truckdrivers unit no longer remained appropriate after Stein merged operations, Stein is not a *Burns* successor as a matter of Board law. Instead, under the newly merged operations, the only appropriate unit for recognition was the wall-to-wall unit established in Local 18's CBA with Stein and affirmed by Local 18 through a card-check process through which an uncoerced majority

of employees performing slag reclamation work for Stein at the Middletown Facility elected to be represented by Local 18.

Put simply, Stein is not a *Burns* successor and is thus absolved from any recognitional and bargaining obligations to Teamsters Local 100. As such, Local 18's subsequent receipt of recognition from, and bargaining and execution of a CBA with Stein do not violate Sections 8(b)(1)(A) and 8(b)(2) of the Act. The General Counsel's allegations of Local 18's unlawful threats and unlawful assistance it received from Stein, as well as acceptance of dues from Stein employees, must likewise fall because they are premised on the faulty presumption that Local 18 was not the lawfully recognized exclusive collective-bargaining representative of those employees.

II. Statement of Facts

A. The International Union of Operating Engineers, Local 18

For over 70 years, Local 18 has represented the interests of operating engineers working in 85 of Ohio's 88 counties, along with four counties in Northern Kentucky. As the name implies, operating engineers are the men and women responsible for, *inter alia*, operating the equipment, machinery, and technology utilized in all aspects of the construction, heavy industrial maintenance, and service industries. In furtherance of its representational duties, Local 18 negotiates and administers a plethora of CBAs covering the extensive scope of its members' work. (TR 682.) Local 18 also maintains a hiring hall through which operating engineers are referred to employment with employers performing work under many of the Union's CBAs. Local 18's representational duties are effectuated through five district offices located in the Ohio cities of Cleveland, Toledo, Akron, Columbus, and Middletown.

B. Stein, Inc.

Stein offers various services to companies engaged in the steel-making process, including slag reclamation work. (Jt. Exh. 1, ¶ 1; TR 230.) As such, Stein participates in an industry that is, by any measure, highly competitive. (TR 1193-94.) Stein's business model uses one bargaining unit and one bargaining unit only to perform all facets of its slag reclamation work. (TR 773, 1188-1192.) For decades, pursuant to a CBA between Stein and Local 18, the Union has been the duly authorized collective bargaining agent for Stein employees working in slag reclamation at steel mills across the state of Ohio. (TR 1190-93.) Under this single bargaining unit approach, Stein's slag reclamation business is built upon the expectation that the work performed by employees is not dictated by their respective bargaining unit. Rather, based upon the needs of the business, each employee is expected to perform whatever task is necessary to get the job done. In this manner, Local 18 members employed by Stein are responsible for not only operating the heavy equipment used in the slag reclamation process, but also drive the haul trucks and perform safety site inspections.

C. AK Steel's Middletown Facility

AK Steel is a steel-making company headquartered in Westchester Township, Ohio. AK Steel owns and operates eight steel-making plants, including a plant located in Middletown, Ohio. (Jt. Exh. 1, ¶ 5.) The steel-making process at the Middletown Facility produces a molten byproduct known as slag. (TR 74, 102.) At the Facility, slag is deposited into troughs or pits that are dug into the ground by employees operating excavators. (TR 1336-37.) Once cooled in the pit, the slag is collected by an employee utilizing a loader and placed into a haul truck[1], which transports the slag to a stockpiling area. (TR 135-36, 1336-37.) At the stockpiling area, an employee operating a

[1] Euclid, Terex, and Hitachi are brands of haul trucks utilized for transporting slag at the Middletown Facility. (TR 79, 238, 531.)

loader places the slag into a haul truck, which then delivers it to a processing plant where the slag is removed from the truck via loader and placed onto a conveyer belt. (TR 76, 135-37, 1337-39.) The slag is subsequently fed into a crusher and then a shaker, after which it is separated by screens into different sized aggregate. (TR 76-77.) This aggregate is stored in designated stockpile areas depending on its grade. (TR 237-38.) The resulting aggregate is used by customers for a variety of road construction projects. (TR 76-77, 212.)

For decades, AK Steel has subcontracted all of its slag reclamation work at the Middletown Facility to third-party slag reclamation service providers. To this end, AK Steel will periodically submit its slag reclamation work to a competitive bidding process, awarding the lowest bidder a contract to perform slag reclamation. (TR 767-68.) Like most segments of our capitalistic economy, the third-party slag reclamation business is highly competitive with opposing companies often bidding on the same job. (TR 109, 768-771.) As a result, it is not uncommon for a steel manufacturer, such as AK Steel, to switch slag contractors.

Over the past century, a variety of entities have performed slag reclamation and processing at the Middletown Facility. In chronological order, they include McGraw Construction Co., International Mill Services, Inc., Tube City Inc. d/b/a/ Olympic Mill Service, Tube City LLC d/b/a IMS Division Tube City IMS, Tube City LLC, Tube City IMS, LLC, and TMS. (Jt. Exh. 1, ¶ 7.) In each instance, the change in slag contractors was occasioned as a result of AK Steel opening the slag contract to competitive bidding or the merger of two or more companies performing slag reclamation work. (TR 184, 767-771; Jt. Exh. 1, ¶ 14.)

D. TMS International, LLC

TMS provides various services to the steel industry, including slag processing, metal recovery, surface conditioning, logistics, and scrap purchasing for the steel-making industry. (Jt.

Exh. 1, ¶ 6.) For over a decade, TMS was responsible for performing slag reclamation and processing for AK Steel at the Middletown Facility. (TR 74, 212-13, 234, 507.) In furtherance of its slag reclamation work at the Middletown Facility, TMS maintained no fewer than three separate CBAs with three separate unions. The truckdrivers that transported slag by haul truck to the processing area were represented by Charging Party Teamsters Local 100. (TR 78-79, 110-11, 277-80, 790.) Laborers that were responsible for site safety, site cleaning, and lancing were represented by Charging Party Laborers' Local 534. (TR 82-86, 112-13, 115-17, 126, 242-43, 246-47, 285-86.) Finally, operating engineers responsible for operating heavy equipment (such as loaders, forklifts, backhoes, skid-steers, portable screening plants, conveyors, scrap handlers, telehandlers, fuel/lube trucks, cable cranes, and backhoes), operating slag processing plants, and maintaining all heavy and transportation equipment were represented by Local 18. (TR 82-86, 112-13, 115-17, 126, 242-43, 246-47, 285-86, 774-89, 793-93.) Although TMS's CBA with Laborers' Local 534 was initially due to expire August 31, 2016 (Jt. Exh. 6, Art. XXII), it was extended by parties until December 31, 2017 (Jt. Exh. 11.) TMS's CBA with Teamsters Local 100 was also due to expire on December 31, 2017 (Jt. Exh. 7, Art. 21.) Conversely, Local 18's agreement with TMS/Tube City IMS was not set to expire until September 30, 2018 (Jt. Exh. 8, Sec. 25.1.)[2]

Throughout the course of TMS's tenure as a slag processor at the Middletown Facility, there was no functional integration between the three trades. That is, the operation of heavy equipment for the purposes of digging pits and loading slag onto haul trucks and conveyer belts,

[2] In addition to maintaining its CBA with Local 18 covering slag operations, TMS was also a party to two separate CBAs with Local 18 covering different types of work at the Middletown Facility. The first of these agreements is known as the "Green Coil CBA" and it covers work TMS performed on new steel products manufactured at the Middletown Facility. (TR 324-25.) The second agreement covers scrap metal processing work TMS performs for AK Steel and is known as the "Scarfing CBA." (TR 800-01.) The work and the employees covered by the Scarfing CBA and the Green Coil CBA are separate and distinct from the work and employees covered by the slag reclamation CBA.

heavy equipment maintenance, and operation of slag processing plants were only performed by operating engineers (TR 247-49, 774-89, 792-93, 831-41, 920-21, 932-40; 1030-36, 1089-94, 1147-52; Emp. Exh. 17-24, 26), the operation of haul trucks, water trucks, parts trucks, and yard trucks was only performed by truckdrivers (TR 794-95, 937-40, 1024, 1093-94, 1152-53; Emp. Exhs. 25, 27), and only laborers performed site safety and general clean-up duty. (TR 84, 127-28, 423-24, 511-13.) At no point were these employees ever cross-trained on the other crafts' respective duties. (TR 116-17, 126-27, 129-30, 283-84.) In effect, TMS structured its operations in such a way that three different crafts performing slag reclamation work were segregated into separate entities that were each responsible for, and defended, the discrete tasks covered by their respective CBAs.

E. Bargaining and representational history at the Middletown Facility

Local 18's history in the slag reclamation process at the Middletown Facility stretches back decades. (TR 688-90.) Indeed, Local 18's presence at the Middletown Facility spans such a long period of time that no single witness was able to definitively state when Local 18 first negotiated a CBA covering slag work at the Middletown Facility. By some estimates, because the very first union contractor that performed slag work at the Middletown facility – McGraw Construction – was engaged in the construction industry, the prevailing wisdom within Local 18 was that the first series of CBAs covering slag work at the Middletown Facility might have been a Section 8(f) pre-hire agreement. *See Ohio Valley Carpenters Dist. Council*, 131 NLRB 854, 856 (1961) ("McGraw is an Ohio corporation with its principal place of business in Middletown, Ohio, engaged in the building and construction business, including work performed by it in constructing additions to the steel mills of the Armco Corporation, hereinafter called Armco, in Middletown, Ohio"). In any event, while the genesis of Local 18's first CBA covering slag work at the Middletown Facility

may be a mystery, more recent events surrounding the nature of Local 18's representational status for employees performing slag reclamation work at the Middletown Facility are not. Indeed, it is abundantly clear that in 1999, Local 18 approached the contractor then performing slag reclamation work at Middletown Facility – Tube City, Inc. d/b/a, Olympic Mill Services[3] – and presented signed authorization cards demonstrating that a majority of the "operators" performing that work wished to designate Local 18 as their bargaining representative. (TR 692-94; L18 Exh. 1.) It is also equally clear that in response to that demand, Olympic Mill Services reviewed the cards, determined that Local 18 did, in fact, represent a majority of its employees, and agreed to so recognize Local 18 as the duly authorized bargaining representative for those employees. (*Id*.) From that point forward, Local 18 has continued to negotiate a series of CBAs covering operating engineers engaged in slag reclamation work at the Middletown Facility. (TR 688-89.)

Unlike Local 18, the General Counsel and the Charging Parties failed to adduce any evidence that their representational status was achieved as a result of demonstrating majority support within the respective bargaining units. (TR 109, 272, 362, 489, 563-64, 764-65, 1179). Instead, the General Counsel admitted that it did not possess any records indicating that the Charging Parties were certified as a representative under Section 9(a) of the Act. (TR 70.)[4] For their part, the Charging Parties acknowledged that they did not possess any documentation or language in a CBA that would indicate that they were, at any time, recognized under Section 9(a) of the Act as a bargaining representative as a result of demonstrating majority support within the unit. (Jt. Exhs. 23-24; TR 36-38, 495-96.) Simply put, both the General Counsel and the Charging

[3] Tube City, Inc. d/b/a, Olympic Mill Services would later merge with International Mill Services Tube City to form Tube City IMs which would later become TMS.

[4] ALJ: So your argument is that there's been no conversion or a creation of a 9(a) relationship based on language in a collective bargaining agreement? Your argument [is] it's not 8(f), and it therefore has to be 9(a), because these entities are not engaged in construction at this particular job site?
Mr. Goode [Counsel for the General Counsel]: Correct, yes, Your Honor.

Parties failed to present any evidence to establish that either or both of the Charging Parties were, at any time, Section 9(a) representatives – by virtue of Board-certified election or voluntary recognition – for any employees working at the Middletown Facility. (TR 109, 271-72, 362-63, 500, 564, 764, 1179.) Rather, the CBAs in place between the Charging Parties and TMS bore all the hallmarks of 8(f) agreements; *to wit*, both CBAs have long contained exclusive hiring hall provisions applied to the slag reclamation/metal recovery services at the Middletown Facility. (TR 352-353, 468, 803, 822-823, 928, 996, 1053, 1055, 1088-1089, 1142-1144.)

F. Stein's winning bid for slag reclamation work at the Middletown Facility

In the summer of 2017, AK Steel opened up its subcontract for scrap reclamation and processing at the Middletown Facility to competitive bidding. (Jt. Exh. 1, ¶ 14.) At that time, TMS was performing this work, utilizing employees represented by Local 18, Teamsters Local 100, and Laborers' Local 534. (*Id.*) TMS's slag processing operations employed 15 individuals represented by Teamsters Local 100, 14 individuals represented by Laborers' Local 534, and 42 individuals represented by Local 18. (Jt. Exh. 1, ¶¶ 17-19.) Stein ultimately submitted what became the winning bid (TR 184), and on October 27, 2017, entered into an agreement with AK Steel to perform scrap reclamation, slag removal, and slag processing at the Middletown Facility. (Jt. Exh. 1, ¶ 14.) Stein's status as the winning bidder for slag work at the Middletown facility was quickly made public knowledge by TMS to its employees, and Charging Parties through their stewards. (TR 90-91, 268, 87, 522-23.)

In preparing its winning bid for the slag work at the Middletown Facility, Stein was planning on using its established business model; namely, one bargaining unit to perform all the slag work. (TR 185-188.) Stein further anticipated that, in accordance with its other slag operations

in Ohio, it would probably employ a majority of employees that were primarily assigned to equipment traditionally operated by Local 18 members. (*Id*.)

After Stein won the bid, Doug Huffnagel, Stein's area manager (TR 210-11, 1187-89), visited the Middletown Facility where he set up camp at an on-site office to observe how TMS operated the slag reclamation and processing work. (TR 1193.) Through his observations, Mr. Huffnagel noticed how TMS oftentimes utilized two or three employees to perform a job that could be satisfactorily performed by one individual. (TR 1193-94.) Mr. Huffnagel also saw an inordinate amount of idling and certain tasks not being completely in a timely fashion. (*Id*.) Aside from these operational issues, Mr. Huffnagel was also visiting the Middletown Facility to observe how TMS employees were performing their respective jobs as a way to aid his individual assessments in the event that any of them chose to apply for work at Stein. (TR 1995.)

Meanwhile, David Holvey, Stein's Vice President and Chief Financial Officer (TR 183), reviewed TMS's seniority list which demonstrated that the majority of TMS employees were represented by Local 18. (TR 184.) Mr. Holvey then contacted Local 18 for the purpose of exploring whether it was appropriate to have a single union – Local 18 – represent the entire complement of employees at the Middletown Facility. (TR 184-85, 187-89; GC Exh. 4.) Stein pursued this route of inquiry because of its established practice of utilizing a single bargaining unit represented by Local 18 for all of its slag processing sites (TR 186, 1190-92), and the fact that the bargaining unit then represented by Local 18's constituted a majority of the TMS employees performing slag work at the Middletown Facility. (TR 186, 1006; L18 Exh. 3.)

On or about November 9, 2017, Mr. Huffnagel conducted two meetings with TMS employees, during which he distributed a document that laid out the terms and conditions of employment for individuals who chose to apply to work for Stein at the Middletown Facility. (Jt.

Exh. 1, ¶ 16; Jt. Exh. 13; TR 214-15, 286-87.) Mr. Huffnagel read this document out loud to those present, and also informed them that Stein would be accepting job applications for the Middletown Facility. (Jt. Exh. 1, ¶ 16; TR 214-15.) Mr. Huffnagel also emphasized that employment with Stein was not guaranteed, as applicants would be subjected to a formal application submission (Emp. Exh. 8; Emp. Exh. 12), an in-person interview, a background check, and a physical examination. (Jt. Exh. 1, ¶ 16; TR 143-44, 287-89, 363-64; 429-30, 469, 571-72, 578, 907, 1196-97.) During the meeting, Mr. Huffnagel indicated that if employees were not already members of Local 18, if hired by Stein, their fringe benefits would no longer emanate from those provided by virtue of their membership in Teamsters Local 100 or Laborers' Local 534. (TR 140-41, 289-90, 433-34, 469-70.) Additionally, by reading from Stein's terms-and-conditions document, Mr. Huffnagel indicated that, if hired, employees not already Local 18 members would not be governed by the same shift differentials, vacations, or probationary periods they currently enjoyed. (TR 141-43, 215, 289-90, 433-34, 469-70, 572-73, 77.) He also fielded numerous questions regarding these changes in job conditions. (TR 215.) It is undisputed that the stewards for Teamsters Local 100 were present at this meeting. (TR 286-87.)

Between November 2017 and the beginning of January 2018, Stein conducted interviews with the TMS employees who had submitted applications for employment at the Middletown Facility. (TR 525-28.) During the interviews, Mr. Huffnagel informed applicants that they would be cross-trained on work that was previously confined to the three separate trades of operating engineer, truckdriver, or laborer. (TR 588-89, 906-07, 1197-98, 1254.) After Stein completed its interviews on or before the first week of January 2018, it hired 56 of the 71 individuals employed by TMS as of December 31, 2017. (Jt. Exh. 1, ¶¶ 20-22.) Of those 56 employees, 36 – a majority – were individuals who were Local 18 members. (*Id*. at ¶ 22.) In sum, Stein hired a total of 60

individuals to perform scrap work at the Middletown Facility on or before the first week of January 2018. (*Id*. at ¶ 23.)

Shortly after Stein assumed operations, in early January 2018, Mr. Holvey met with Local 18 officials at the Union's District 3 offices, where he was presented with authorization cards from the Middletown Facility work force for his inspection. (TR 1009-10; L18 Exh. 3.) Upon review of these documents, the parties confirmed that 34 of the 60 employees Stein hired on January 1, 2018 signed authorization cards indicating that they desired representation by Local 18. (*Id*.) Moreover, each and every one of these authorization cards were *signed well before Stein was awarded the contract for slag reclamation work at the Middletown Facility*. (TR 186, 1006; L18 Exh. 3.) Based upon this card-check process clearly demonstrating that 34 of the 60 individuals Stein hired – a majority – desired to be represented by Local 18, Stein voluntarily recognized Local 18 as the exclusive bargaining representative for all of its employees at the Middletown Facility. This recognition was contractually memorialized in the CBA Local 18 and Stein entered into, which provided that Stein "recognize[s] the Union as the exclusive bargaining representative for all employees within the contractual bargaining unit pursuant to Section 9(a) of the National Labor Relations Act based upon the Union having provided the Company with evidence of its support by a majority of such employees; and [that] the Union and the Company desire to set forth in writing their agreement on rates of pay, hours of work, and other conditions of employment[.]" (Jt. Exh. 16, preamble, § 1.01.) The CBA contained the following classifications: General Laborer, Mechanic Helper, Lancer, Lube Man, Site Laborer/Safety, Truck Driver, General Operator, Crane Operator, B-Mechanic, Hot Pit Operator, A-Mechanic, and Master Mechanic. (*Id*. at § 6.01.)

As Mr. Huffnagel indicated during his November 2017 meeting to TMS employees, Stein began cross-training them during the first week of January 2018. (TR 303-05.) While newly hired

employees – formerly employed under TMS and exclusively devoted to operating engineer, truckdriver, or laborer work – were still performing some of the same tasks they had done for TMS, in light of Stein's cross-training, they began performing the work of other classifications within the first week of January 2018 and continued doing so through the spring. (TR 1281-84.) Specifically, multitudes of employees previously only performing: 1) operating engineer work were running haul trucks to convey slag aggregate and water trucks to keep down dust levels (TR 589, 593, 1290, 1299-1307, 1310-11, 1320-21; L18 Exh. 4; Emp. Exhs. 2-4); 2) laborer work were operating skid-steers, loaders, backhoes, telehandlers, skid-steers, running plants, and driving haul trucks, parts trucks, and water trucks (TR 367-68, 372, 374-76, 591-93, 595-96, 844-89, 903, 942-79, 984-95, 1038-53, 1097-1117, 1154-1177; Emp. Exhs. 13, 28-30); and 3) truckdriver work were running backhoes, loaders, and serving as on-site safety attendants. (TR 305-06, 308-09, 594, 597-98, 1291; Emp. Exhs. 13-14.) Significantly, these employees were performing work that heretofore had been segregated by trade; for example, former laborers were operating loaders not only to perform site cleanup, but to also load slag throughout the Middletown Facility. (TR 1000.) Stein further materially modified operations at the Middletown Facility by requiring that all employees record their shifts with the same time clock (TR 1214-15) and moving away from eight-hour shifts running around the clock – as TMS had utilized – to two 12-hour shifts. (TR 1333-35.) And of the four shift supervisors and site superintendents that TMS employed at the Middletown Facility – Willie Huseman, Bob Huseman, Ty Reynolds, J.R. Cement, Nate Prince, and Chad Bear – Stein re-employed only Messrs. Prince and Bear. (TR 228, 293-94.)

Additionally, when Stein commenced operations at the Middletown Facility, it brought in its own heavy equipment to engage in scrap reclamation and processing, including cranes, loaders, and haul trucks. (TR 584.) In that same vein, Stein ceased using certain cranes that TMS had

utilized when it had performed scrap work at the Middletown Facility. (TR 583.) Similarly, upon assuming operations, Stein ensured that all of its employees share the same lunchroom, shower facilities, and locker room. (TR 275-76, 1212-14.) Likewise, all employees, regardless of their classification, participated together in shift-wide monthly safety training meetings. (TR 276-77.) During these meetings, all employees received the same training, such as the safe operation of overhead cranes and mobile equipment, regardless of their classification. (Emp. Exh. 6; TR 310-12.)

III. Law and Argument

A. Teamsters Local 100 was not the Section 9(a) representative of the truckdrivers unit, thus absolving Stein of any recognitional or bargaining obligations because the relationship between Teamsters Local 100 and TMS was not predicated on Section 9(a) of the Act. [Exception No. 14.]

"The bargaining obligation of a 'successor-employer' derives from both the specific mandate of Sections 8(a)(5) and 9(a) of the Act that an employer must bargain with 'representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,' and from the general acknowledgement that a mere change in ownership does not destroy the presumption of continuing employee support for a certified or voluntarily recognized union." *Sch. Bus Serv., Inc.*, 312 NLRB 1, 3 (1993), *enfd.*, 46 F.3d 1143 (9th Cir. 1995). The ALJ concluded that a presumption of continuing employee support for Teamsters Local 100 existed via voluntary recognition by way of the mere fact that a CBA between the Charging Party and TMS existed. Because the CBA recognized Teamsters Local 100 as "the sole and exclusive bargaining unit" of the "truckdrivers" unit (ALJ Dec., p. 5) this was enough to establish the 9(a) status of Teamsters Local 100. (*Id.* at p. 21.) The ALJ's conclusion, however, is untenable under Board precedent.

The Board has held that a lawful CBA by itself is insufficient to establish a presumption of majority status. If an incumbent union's majority status is not presumed through certification, but through voluntary recognition, there must be more than simply the existence of a lawful CBA for the presumption to attach. As a threshold matter, there is no dispute that "the presumption of continued majority status applies to incumbent unions either certified or voluntarily recognized[.]" *Rockland Lake Manor, Inc.*, 263 NLRB 1062, 1070, fn. 26 (1982). In the former setting, the presumption is "derived from the certification," as it provides proof of majority status. *Rohlik, Inc.*, 145 NLRB 1236, 1240 (1964). Indeed, "presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved." *Buckley Broadcasting Corp.*, 284 NLRB 1339, 1344 (1987). That a union initially has majority status is proven by the certification, thereby giving rise to the presumption that majority status continues through the life of the CBA and after its expiration in the 9(a) context. However, absent certification, the fact alone that an employer executes a CBA cannot satisfy the baseline showing of majority status – from which the presumption arises – because it "was as of no time established by proof and hence the finding of such majority . . . is only by a departure from established legal principle and amounts to no more than piling the Pelion of one presumption upon the Ossa of another to reach a result which is not supported by the record." *Shamrock Dairy, Inc.*, 124 NLRB 494, 505, fn. 9 (1959) (Member Bean, dissenting in part and concurring in part).

Accordingly, "where an employer has voluntarily recognized and entered into contractual relations with a union as the majority representative of the employees involved, *following proof of the Union's majority in some manner other than a Board certification*, the contract gives rise to a presumption that the Union's status as majority representative continues during the life of the

contract and (presumably for a reasonable time) thereafter[.]" *Serv. Canvas Co.*, 198 NLRB 88, 91 (1972). (Emphasis added.) In other words, either through contract clause or affirmative testimony, there must be an independent "factual basis to conclude at one time the union in fact represented a majority of employees in an appropriate unit." *A&M Trucking, Inc.*, 314 NLRB 991, 995 (1994).[5]

Important to the instant matter, in the context of the voluntary recognition test, the General Counsel maintains the "initial burden to show majority status . . . . by establishing that the [employer] voluntarily recognized the Union" based upon a showing of majority support. *See Royal Coach Lines, Inc.*, 282 NLRB 1037, 1037, fn. 2 (1987), *enf. denied on factual grounds*, 838 F.2d 47 (2d Cir. 1988).[6] *See also Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959) ("It is elementary that in a refusal-to-bargain case the General Counsel has the burden of proving the union's majority"). If and only if the General Counsel has satisfied its initial burden to establish majority, does the respondent employer then bear a subsequent burden "of coming forward with sufficient evidence" to rebut it. *See Contemporary Guidance Servs., Inc.*, 291 NLRB 50, 65 (1988).

In the present case, the General Counsel failed to meet its evidentiary burden in demonstrating that there is an independent factual basis to conclude that Teamsters Local 100 maintained its majority status in the truckdrivers unit by virtue of voluntary recognition. That is, there is no "proof of the Union's majority in some manner other than a Board certification," *Serv. Canvas Co.*, 198 NLRB at 91. The record unambiguously demonstrates that at no point prior to Stein assuming operations did TMS employees ever participate in a Board-conducted election for

[5] In *A&M Trucking*, the Board found, contrary to the ALJ, that the employer had violated Section 8(a)(5) when it refused to furnish information on the basis that there was no enforceable contract to memorialize this obligation. *Id*. at 991. However, the Board disagreed with the ALJ's application of the law to the facts, not the ALJ's recitation of the applicable law itself.

[6] On review, the Second Circuit noted that "[w]hen the Board reviewed the ALJ's decision, it correctly began its analysis by noting that the General Counsel had carried its 'initial burden' to show majority status by establishing that the employer had voluntarily recognized the union." *Royal Coach Lines, Inc.*, 838 F.2d at 55.

representation by either Teamsters Local 100 or Laborers' Local 534. (TR 109, 271-72, 362-63, 500, 564, 764, 1179.) The only remaining avenue by which the General Counsel could assert a 9(a) relationship is through voluntary recognition. The instant record clearly establishes that at no point had the Charging Parties ever conducted a card check at the Middletown Facility or otherwise presented TMS or its predecessors with evidence of majority support. (TR 501, 765-66.)

Teamsters Local 100's CBAs likewise do not indicate that they ever represented a Board-certified unit, nor do they clearly and equivocally state that they recognize the Charging Parties on proof of majority status. Instead, the CBAs the Charging Party had with TMS merely indicate that TMS "recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining in regard to wages, hours and other terms and conditions of employment for all truck drivers employed by the Employer at its AK Steel, Middletown, Ohio facility[.]" (Jt. Exh. 3, Art. I; Jt. Exh. 4, Art. I; Jt. Exh. 7, Art. I.) Simply put, the CBAs fail to contain any language that could provide an independent factual basis to conclude that Teamsters Local 100 has ever achieved majority support within the bargaining unit it purports to represent.

The ALJ's reliance on *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962 (1970), *enfd. in part*, 470 F.2d 669 (9th Cir. 1972) ("*Barrington Plaza*") to support the contrary position can be distinguished. *Barrington Plaza* held that "[t]he existence of a prior contract, lawful on its face, raises a dual presumption of majority – a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract." *Id*. at 963. The Board further held that "[f]ollowing expiration of the contract, this presumption continues and is not dependent on independent evidence that the bargaining relationship was originally established by a certification or majority card showing," and also "applies . . . to a successorship situation[.]" *Id*. However, subsequent

Board decisions have merely affirmed *Barrington Plaza* without further elaboration or clarification *See, e.g., J.P. Sturrus Corp.*, 288 NLRB 668, 672, fn. 5 (1988); *Alpert's, Inc.*, 267 NLRB 159, 160, fn. 1 (1983); *Ric's Best Auto Painting*, 248 NLRB 1028, 1041 (1980); *Century Printing Co.*, 242 NLRB 659, 668 (1979). Moreover, *Barrington Plaza* runs counter to Board law in *Serv. Canvas Co.* providing that in the absence of certification, there must be more than an extant CBA to justify a presumption of majority status. It also bears noting that in *Barrington Plaza*, the Board awarded a union's 9(a) status in the context of a previously, and barely, unsuccessful card check process. 185 NLRB at 964. Similarly, the employer voluntarily recognized the union after this nearly successful card check. *Id*. By stark contrast, neither the Charging Parties nor the General Counsel elicited any evidence demonstrating that there was an attempt made to establish the majority status of the Charging Parties within TMS's former units nor was there any effort to establish majority status after Stein assumed operations at the Middletown Facility.

At bottom, contrary to the ALJ's conclusion, the mere existence of a CBA between TMS and Teamsters Local 100, without independent evidence of the latter's majority status, is insufficient to create a presumption of majority status that would gift the Charging Party with 9(a) representative status. Yet because Stein's bargaining obligation to the Charging Parties specifically "derives from" this specific mandate of presumed majority support under Section 9(a), such an obligation cannot attach. *See Sch. Bus Serv., Inc.*, 312 NLRB at 3. The nature of this conclusion also makes inevitable the finding that Section 10(b) does not bar Respondents' ability to "attack a union's initial recognition by the predecessor when that recognition was beyond the Section 10(b) six-month limitation period[.]" (ALJ Dec., p. 20.) Typically, "where an employer outside the construction industry expressly recognizes a union as the 9(a) representative, the union becomes the 9(a) representative of the unit employees, unless the employer timely produces affirmative

evidence of the union's lack of majority at the time of recognition, i.e., within the [six month] 10(b) period." *Hayman Elec., Inc.*, 314 NLRB 879, 887, fn. 8 (1994). However, as in the instant matter, where the evidence establishes that the employer "did *not* extend recognition under Sec. 9(a) . . . [the Board] find[s] it unnecessary to pass on . . . [the] contention" that "Sec. 10(b) precludes a challenge to the Respondent's voluntary grant of 9(a) recognition more than 6 months after that recognition." *USA Fire Protection*, 358 NLRB 1722, 1722, fn. 4 (2012), *enfd. sub nom. Road Sprinkler Fitters Local 669 v. NLRB*, 637 Fed Appx. 611 (D.C. Cir. 2016). (Emphasis added.) Thus, in the absence of any independent evidence supporting the Charging Party's Section 9(a) representational status, regardless of any Section 10(b) limitations, it cannot be said that Stein was obligated in any fashion to recognize and bargain with Teamsters Local 100.

B. Stein was not obligated to recognize or bargain with Teamsters Local 100 as a *Burns* successor to TMS because the truckdrivers unit was no longer appropriate under Stein. [Exception Nos. 2, 4-13.]

An employer is a "successor employer, obligated to recognize and bargain with a union representing the predecessor's employees, when (1) there is a substantial continuity of operations, and (2) a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees." *E.g., Allways East Transp., Inc.*, 365 NLRB No. 71, slip op. at 2 (2017), citing *NLRB v. Burns Internatl. Security Servs., Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). With respect to whether substantial continuity of operations exists, "the following factors . . . [are] relevant to the analysis: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Id.*

Determining whether a majority of the new employer's work force is composed of the "appropriate unit" is "[c]ritical to a finding of successorship[.]" *Banknote Corp. of Am.*, 315 NLRB 1041, 1043 (1994), *enfd.*, 84 F.3d 637 (2d Cir. 1996). As to the propriety of the new employer's work force, it is a long-standing Board principle, following the Supreme Court's guidance in *Burns*, that all successorship cases "are predicated on the finding that the predecessor's bargaining unit remained intact under the successor and continued to be an appropriate unit." *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 821 (1973). In the case *sub judice*, Stein cannot be considered a *Burns* successor because the truckdrivers unit was not the appropriate unit under Stein's operations. Instead, under Board precedent, the bargaining unit memorialized in the CBA between Local 18 and Stein constituted the appropriate unit for successor analysis. Thus, because a majority of the employees in that unit were not represented by Teamsters Local 100, there was insufficient continuity to trigger Stein's bargaining obligation under *Burns*.

"In deciding the issue" of whether a successor is obligated to bargain under the Act, "the Board must examine the 'totality of the circumstances,' the essential questions being whether the successorship unit remains intact as an appropriate unit and as one in which the union's majority can be presumed to continue." *White-Westinghouse Corp.*, 229 NLRB 667, 672 (1977), quoting *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3 (1st Cir. 1976). Under Board successorship law, "the courts and the Board recognize that (i) bargaining units may be materially altered or extinguished based on major business changes . . . (ii) the only appropriate unit following such a transition may be the post-transition combined group of employees; and (iii) a union's representative status, following such a transition, should turn on whether it has majority support in the posttransition [sic] unit." *ADT, LLC*, 365 NLRB No. 77, slip op. at 10 (2017) (Chairman Miscimarra, dissenting).

In the context of successorship obligations, "[a]lthough the weight given to a prior history of collective bargaining is 'substantial,' it is not 'conclusive.'" *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 119 (D.C. Cir. 1996), quoting *A.C. Pavement Striping Co.*, 296 NLRB 206, 210 (1989). Indeed, "an effective bargaining history . . . *is out one of several factors* considered by the Board in deciding whether a proposed unit appropriately groups the employees in accordance with their mutual interests." *Illinois Cities Water Co.*, 87 NLRB 109, 113 (1949). (Members Houston and Murdock, dissenting.) (Emphasis sic.) Unsurprisingly then, "[t]he most common way for a successor to meet its burden [in establishing that the unit is no longer appropriate] is to show that it has made significant revisions in plant operations and employee duties." *Deferiet Paper Co. v. NLRB*, 235 F.3d 581, 584 (D.C. Cir. 2000), citing *Firestone Synthetic Fibers Co.*, 171 NLRB 1121, 1123 (1968). Critically, "both pre-acquisition and post-acquisition changes in plant operation will . . . render an historical unit inappropriate." *Id*., citing *Rock-Tenn Co. v. United Paperworkers Union, Local 1106*, 274 NLRB 772 (1985). In *Rock-Tenn Co.*, the Board held that despite a purported "'long history' of bargaining . . . it is not determinative where, as here, significant changes in the organizational structure and operations" – both pre-acquisition and post-acquisition – of the employer have occurred rendering the prior bargaining unit inappropriate. 274 NLRB at 773.

Even assuming that the timing of the successor's implemented changes plays some role in assessing the weight it carries as to the continued propriety of the bargaining unit, the Board has expressly held that under certain scenarios, this role is reduced to a nullity. Thus, when there is a question as to whether "the historical bargaining unit did not survive" in "determining whether circumstances exist that warrant the merger of bargaining-unit employees into a larger unit or employee group," the Board is not constrained by the timing of an employer's changes when the

evidence demonstrates that "'there is a well-defined plan or timetable for achieving fuller functional integration.'" *Pacific Crane Maintenance*, 359 NLRB 1206, 1211 (2013), quoting *Comar, Inc.*, 339 NLRB 903, 910 (2003). The Board has considered timetables as long as nine months after any bargaining obligations would otherwise attach. *Id*. at 1212. The critical question is whether, at the time its bargaining obligation matures, the employer has "plans to fully integrate the former . . . unit into its existing operations." *Id*.[7]

In the present case, the record evidence bears out that Stein put forward a "well-defined plan or timetable for achieving fuller functional integration," *see Pacific Crane Maintenance*, 359 NLRB at 1211, between the prior units represented by the Charging Parties and Local 18, and that those changes in fact occurred in the consecutive months following its acquisition of the Middletown Facility. Moreover, these changes are of the breadth and depth that would render the truckdrivers unit inappropriate vis-à-vis Stein based upon two well-established Board cases: *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973) and *Indianapolis Mack Sales and Service, Inc.*, 288 NLRB 1123 (1988).

In *Border Steel Rolling Mills*, the employer's workforce was represented by the Steelworkers, which included both maintenance employees and long haul truckdrivers. 204 NLRB at 819. However, the employer did not own, but instead leased the tractor trailers that its long haul truckdrivers operated to deliver product to the employer's customers. *Id*. at 817. The leasing company's maintenance employees were responsible for the upkeep of the tractor trailers on the employer's premises, and were represented by the Teamsters. *Id*. at 817-18. Both units of

[7] Thus, in excepting to the ALJ's conclusion that "Respondents must prove that as of the date the demand for recognition/request for bargaining there were compelling circumstances that made the historical units no longer appropriate," Local 18 excepts to the ALJ's evidentiary ruling that "evidence related to . . . cross-training and cross-jurisdictional assignment of work through March, but not beyond . . . . is hereby stricken." (*See* ALJ Dec., p. 19, fn. 20.) This evidence includes Emp. Exhibits 2, 3, 4, 5, 13, 14, and 15.

represented employees had a history of bargaining with their respective employers. *Id*. at 818-19. After some years of this arrangement, the leasing company fell into bankruptcy. *Id*. at 818. As part of the reorganization, the employer purchased the tractor trailers which it had previously leased, and hired 12 of the leasing company's maintenance employees as its own to continue servicing the tractor trailers. *Id*. Upon hiring these individuals, the employer applied the terms and conditions of Steelworkers CBA to them, and shortly thereafter, the employer and Steelworkers executed a supplemental agreement that covered these employees within the bargaining unit. *Id*. at 819. Just prior to hiring the former leasing company mechanics, the Teamsters contacted the employer, indicating that they were the exclusive bargaining agent for such employees. *Id*. at 818. The employer refused to recognize the union, asserting that it was not a legal successor. *Id*. at 818-19.

The Board, in wholly adopting the ALJ's decision, agreed that the employer was not a *Burns* successor. *Border Steel Rolling Mills*, 204 NLRB at 814. Even though the Teamsters had requested recognition prior to the transfer, the Board concluded that "the integrity of the [Teamsters] bargaining unit *after* the transfer" of those employees and equipment to the employer was sufficiently weakened such that the employer "did not violate the Act by recognizing the Steelworkers as the representative of the . . . employees or by extending its contract with the Steelworkers to cover those employees." *Id*. at 821-22. (Emphasis added.) Post-transfer, the Board noted that in addition to servicing the tractor trailers, the 12 employees maintained the remainder of the employer's fleet – such as forklifts, haul trucks, and yard trucks – along with the Steelworkers-represented employees who had already been performing such work prior to the transfer. *Id*. at 819-20. These 12 employees also collaborated with other unit employees who were primarily responsible for the maintenance of stationary mill equipment. *Id*. at 820. Through this effective cross-training that occurred after transfer, the employer was able to call on any of the 12

employees to perform any type of maintenance work "whenever the needs of the overall operation demand it." *Id*. Tellingly, the ALJ noted that, at the time of this decision, the employer's functional and operational changes were still "in the process of change." *Id*. At bottom, the Board approved the ALJ's conclusion that the 12 employees were now "an integrated part of . . . [the employer's] overall operation . . . and are properly part of the . . . bargaining unit represented by the Steelworkers[.]" *Id*. at 822.

In *Indianapolis Mack Sales and Service*, the predecessor employer negotiated two separate CBAs with the same union for service and parts employees, respectively. 288 NLRB at 1124. These two units had a long history of bargaining with the predecessor until a successor entity took over operations. *Id*. The service employees were responsible for maintaining vehicles and the parts employees were responsible for receiving and issuing new parts to the service employees, as well as selling such parts to customers. *Id*. Under the successor, these employees largely carried on their respective duties, but significant functional and operational changes otherwise rendered their separate units no longer appropriate to such a degree that the Board held the successor was not obligated to recognize and bargain with the union vis-à-vis the service employees unit. *Id*. at 1123.

Specifically, under the successor, no employee "specialize[d] in a particular task." *Indianapolis Mack Sales and Service*, 288 NLRB at 1125. As upheld by the Board, the ALJ noted that "[j]oint training opportunities offered *since* [the successor's] takeover underscore the close working relationship between the two units." *Id*. (Emphasis added.) All employees were assigned to a "wide range of jobs," and those "lesser skilled" were paired with more skilled workers to cross-train on "more complex jobs[.]" *Id*. Specifically, parts employees performed "electrical repairs, change[d] windshield wipers, tail lights, or mudflaps . . . preventative maintenance . . . [and] install[ation.]" *Id*. Moreover, parts employees would "[o]ften . . . accompany a mechanic . .

. to assist in determining the price part needed for the repair." *Id*. And depending on the needs of the successor and service employees' work schedules, mechanics would "be assigned . . . to the parts department to unload new parts or pack parts" as well as "obtaining parts for . . . [customers] or responding to their inquiries." *Id*. The Board agreed that a total of nine employee transfers – i.e., nine cross-trained employees – between these departments, constituted actionably "common" interchange. *Id*. Ultimately, the Board held that "the record [was] . . . barren of evidence to support the conclusion that . . . the service department employees constitute a separate appropriate craft unit." *Id*. at 1127. Instead, the successor "introduced new practices that strengthen the mutual interests of the parts and service employees," resulting in "functional integration[.]" *Id*.

As with the employers in *Border Steel Rolling Mills* and *Indianapolis Mack Sales and Service*, upon commencing work on January 1, 2018, Stein employees began cross-training and, after receiving such training, began performing work in all aspects of Stein's slag operations, regardless of whether they were previously limited to operating engineer, truckdriver, or laborer work. Stein employees Troy Neace, Ova Venters, Timothy Willhoite, Michael Young, and Christopher Michael were all previously employed by TMS at the Middletown Facility.[8] These individuals performed laborer work for TMS, and none of them ever utilized heavy equipment or haul trucks. (TR 901, 920-21, 932-40, 1030-1036, 1089-94, 1147-53, 1162-63.) Contrary to the ALJ's conclusion that these employees "perform[ed] limited cross-jurisdictional work . . . while continuing to perform their traditional job duties" (ALJ Dec., p. 18), the record bears out that these individuals received constant, consistent, and thorough cross-training and cross-jurisdictional assignments from Stein throughout the first few months of 2018.

[8] Throughout the hearing, and in some exhibits, Mr. Michael was also referred to as "Michaels." However, upon direct examination, he clarified that his last name was "Michael." (TR 1085.)

Mr. Neace received cross-training on slag processing plants within the first two months of Stein assuming operations, and began operating the plants during this same time period. (TR 374-76, 379.) Between February and March 2018, Mr. Neace ran slag processing plants for the entirety of nine separate shifts. (TR 1164-66, 1173-77; Emp. Exhs. 29-30, pp. 1385, 1409, 1412, 1415, 1468, 1471, 1477, 1492, 1502.)[9] As a thoroughly cross-trained and cross-jurisdictional employee, Mr. Neace also ran slag processing plants in conjunction with laborer-cleaning tasks and the operation of backhoes and parts trucks an additional eight entire shifts throughout this same time period. (TR 1158-64, 1166, 1172-73, 1177; Emp. Exhs. 29-30, pp. 1372, 1378, 1381, 1422, 1437, 1443, 1461, 1497.) And starting in January 2018, Mr. Neace also received cross-training and operated a parts truck, backhoe, man lift, parts truck, and water truck for the majority of at least eight shifts through March 2018. (TR 1154-58, 1169-70, 1172, 1175-76; Emp. Exhs. 28-30, pp. 1343, 1344, 1358, 1424, 1428, 1431, 1441, 1486.) Mr. Neace's cross-training on the water truck continued through May 2018, when he received a training certificate signed by Stein employee Gary Wise, averring that he was properly trained to operate such equipment. (Emp. Exhs. 14, p. 1, 16; TR 603.)[10]

Mr. Venters received cross-training, and subsequently started working on a variety of heavy equipment in January of 2018. Specifically, he spent the majority of his shifts operating a skid-steer, backhoe, and telehandler on five separate dates in January 2018. (TR 844-850; Emp. Exh. 28, pp. 1304, 1326, 1329, 1332, 1334.) Throughout February 2018, Mr. Venters operated a backhoe, skid-steer, and parts truck no less than 15 dates for the majority of his shifts. (TR 854-69; Emp. Exh. 29, pp. 1356, 1363, 1366, 1369, 1374, 1379, 1380, 1386, 1390, 1392, 1400, 1404,

[9] These page numbers refer to the Bates-labeled page numbers Stein generated in producing Exhibits 28-30.
[10] Gary Wise sometimes went as Will Wise, and indicated his name as such on the documents relevant to this matter. (TR 578-79.)

1408, 1411, 1413.) And during the month of March 2018, Mr. Venters ran a backhoe, water truck, and haul truck at least 15 separate times during the majority of his shifts. (TR 871-889; Emp. Exh. 30, pp. 1414, 1418, 1425, 1429, 1432, 1447, 1447, 1452, 1457, 1462, 1476, 1479, 1482, 1486, 1493, 1501.) Stein ensured that he was a thoroughly cross-trained employee, as when he was not operating heavy equipment, he was performing laborer-cleaning duties, as necessary. (*Id*.)

Mr. Willhoite also received cross-training in January 2018 for a variety of different equipment. On six different occasions in January and February 2018, he operated a telehandler, skid-steer, backhoe, loader, and parts truck for the majority of his shifts. (TR 942-52; Emp. Exhs. 28-29, pp. 1314, 1323, 1394, 1396, 1406, 1410.) And in March 2018, Mr. Willhoite operated a portable plant, backhoe, telehandler and skid-steer on 14 separate occasions for the majority of his shifts. (TR 953-76; Emp. Exh. 30, pp. 1416, 1419-20, 1426, 1430, 1433, 1448, 1453, 1458, 1463, 1473, 1490, 1494, 1498.)

For his part, Mr. Young was cross-trained on haul truck operations in the spring of 2018, and on no less than 13 occasions in March 2018, he ran a haul truck for the majority of his shifts. (TR 1040-52; Emp. Exh. 30, pp. 1427, 1434, 1442, 1459, 1466, 1469, 1480, 1483, 1495, 1499, 1500, 1504-05.) Stein also made cross-jurisdictional assignments to Mr. Young for operation of skid-steer in March, as well. (TR 1038-40; Emp. Exh. 30, pp. 1421.)

Receiving cross-training in January 2018, Mr. Michael became a versatile employee who operated a skid-steer and backhoe on at least 13 occasions during the majority of his shifts in January 2018 and February 2018. (TR 1097-1108; Emp. Exhs. 28-29, pp. 1310, 1312, 1318, 1320-22, 1324, 1327, 1330, 1345-46, 1383-84.) In March 2018, Stein expanded Mr. Michael's cross-training, and continued to operate backhoes and skid-steers, but also began operating telehandlers and haul trucks on at least six dates during the majority of his shifts in March 2018. (TR 1108-17;

Emp. Exh. 30, pp. 1445, 1450, 1460, 1465, 1467, 1470.) As with Mr. Neace, Stein continued cross-training Mr. Young into May 2018, when he received a training certified signed by Stein employee Gary Wise, confirming that he was properly trained to operate a yard truck. (Emp. Exh. 15, TR 599-602.)

Stein additionally cross-trained a number of operating engineers and truckdrivers. Specifically, throughout January 2018, Stein employee Michael Lane observed laborers operating skid-steers, water trucks, and haul trucks, and operating engineers running haul trucks. (TR 589, 591-93.) These observations are borne out by the record evidence. Stein employee Scott Bowling – formerly employed as a truckdriver under TMS – trained operating engineer employee Jesse Watkins on the operation of haul trucks and water trucks throughout August 2018, such that he was certified to operate this equipment. (Emp. Exhs. 2, 4; TR 294-96, 302-04.) In turn, Mr. Bowling received cross-training from Stein employees Brian Porter and Ova Venters (who by this point had become a competent cross-trained employee on heavy equipment) on the operation of backhoes throughout April and May 2018, thus resulting in his certification to run the same. (Emp. Exh. 5; TR 305-06, 308-09.) At Stein's direction, Stein employee Gary Wise trained former laborer Gabby Huffnagel on water truck operations on multiple occasions in May 2018, and she received a certification indicating that she was properly trained to operate such equipment. (Emp. Exh. 13, p. 1; TR 595-96.) Mr. Wise himself received multiday training from Stein employee Chris Smith in May 2018, such that he was certified to operate a backhoe. (Emp. Exh. 14, p. 1; TR 597-98.) Likewise, Stein employee and operating engineer, Mike Corley received training from Mr. Bowling and employee Kyle Hoges in June 2018 to operate a haul truck, resulting in his certification to run that equipment. (Emp. Exh. 3.) And Stein employee Mike Kingery, previously employed by TMS at the Middletown Facility as an operating engineer, received cross-training

and began running haul trucks to transfer slag in March 2018 no less than eight times during the majority of his shifts. (TR 1300-07; L18 Exh. 4, pp. 1436, 1440, 1449, 1454, 1484, 1487, 1491.) On March 23, 2018, Mr. Kingery hauled 26 different loads of material alone. (TR 1310-11, L18 Exh. 4, 1484.) While at TMS, Mr. Kingery operated a loader and other heavy equipment, but never engaged in truckdriver activities. (TR 1296-97, 1320-21.)

As with the 12 employees who no longer belonged to an appropriate unit after the successor assumed operations in *Border Steel Rolling Mills*, Messrs. Neace, Venters, Willhoite, Young, and Michael, and Ms. Huffnagel (all previously laborers under TMS), Messrs. Bowling and Wise (previously truckdrivers under TMS), and Messrs. Watkins, Corley, and Kingery (all operating engineers under TMS) received cross-training to perform the remainder of Stein's slag processing work that they had not previously done while so employed at TMS. In other words, these 11 employees received cross-training and cross-jurisdictional assignments on truckdriving and heavy equipment operation if they had not previously done so while working under TMS. To this end, they joined the larger roster of employees who *had* been performing this work prior to the succession, which necessitates a finding that the truckdrivers unit is no longer appropriate for successorship purposes. *Border Steel Rolling Mills*, 204 NLRB at 819-20. As the record bears out, also like the employees in *Border Steel Rolling Mills*, once properly cross-trained, Stein could, and in fact did, make a multitude of cross-jurisdictional assignments for these employees, "whenever the needs of the overall operation demand it." *Id*. at 820.

Stein's intermixing of employees is likewise identical to that which the Board found resulted in an inappropriate unit for successorship purposes in *Indianapolis Mack Sales and Service*. These 11 Stein employees were assigned to a "wide range of jobs," and at Stein's direction, started undertaking these cross-jurisdictional assignments at its direction and training.

288 NLRB at 1125. Moreover, in *Indianapolis Mack Sales and Service*, a total of nine employee transfers was sufficient interchange in terms of cross-jurisdictional work such that there were "new practices that strengthen the mutual interests" of the previously appropriate units under the predecessor, such that they were no longer appropriate under the successor. *Id*. at 1127.

Critically, that this cross-pollination occurred primarily after Stein assumed operations at the Middletown Facility has no bearing on its weight in determining whether the truckdrivers unit is inappropriate because "post-acquisition changes in plant operation" equally control in evaluating the lack of propriety for a historical bargaining unit. *Deferiet Paper Co.*, 235 F.3d at 584. In concluding that the historical bargaining unit was no longer appropriate in *Border Steel Rolling Mills*, the Board approvingly noted that the employer's changes leading to its lack of propriety were still "in the process of change." 204 NLRB at 820. It was the totality of the evidence "after the transfer" of these employees into the successor's operations that resulted in a finding that the employer did not violate the Act by failing to recognize and bargain with the predecessor's union due to lack of unit appropriateness. *Id*. at 821-22. Similarly, the Board concluded in *Indianapolis Mack Sales and Service* that it was the cross-pollination effectuated by the employer "since . . . [its] takeover" that was relevant in determining whether the employer was obligated to bargain with the union. 288 NLRB at 1125.

Even so, Stein had already planned to implement these changes prior to commencing operations on January 1, 2018. Stein's business model throughout Ohio involves operational and contractual relationships with a single bargaining unit to perform all aspects of its slag reclamation work. (TR 773, 1188-1192.) With a single bargaining unit, the work performed is dictated by the needs of the employer to perform any essential task necessary to get the job at hand completed, regardless of whether that constitutes laborer work, truckdriving, or heavy equipment operation.

To this end, Local 18 has been the duly authorized collective bargaining agent for Stein employees working in slag reclamation at steel mills across the state of Ohio. (TR 1190-93.) Stein was committed to maintaining this operational schema when its representative, Doug Huffnagel, visited the Middletown Facility before Stein took over. There, he observed how TMS oftentimes utilized two or three employees to perform a job that could be satisfactorily performed by one individual. (TR 1193-94.) Mr. Huffnagel also noticed an inordinate amount of idling and certain tasks not being completely in a timely fashion. (*Id*.) Stein thus recommitted to its efforts in maintaining a single bargaining unit at this site by planning and, as described *supra*, executing "'a well-defined plan or timetable for achieving fuller functional integration'" amongst its employees into a single unit. *Pacific Crane Maintenance*, 359 NLRB at 1211 (2013). Indeed, the bulk of integrating the Charging Parties' units "into its existing operations" occurred within the first three months of beginning work at the Middletown Facility, and continued for upwards of seven months after. This timetable is clearly within the acceptable parameters of integration after any bargaining obligation to Stein would otherwise attach. *Id*. Ultimately, because the truckdrivers unit no longer remained appropriate after Stein commenced operations, it thus "follows that because . . . [the employer] did not violate Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union [representing the prior bargaining unit under the predecessor] . . . the complaint should be dismissed." *Indianapolis Mack Sales and Service*, 288 NLRB at 1127.

Despite the clarity of the foregoing law, the ALJ rejected Local 18's argument that the truckdrivers unit was no longer appropriate when Stein commenced operations at the Middletown Facility due to its significant operational and structural changes in part because "[t]he continued appropriateness of the historical unit is measured at the time the bargaining obligation attaches." (ALJ Dec., p. 17, citing *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007).) However, upon closer

review, the ALJ's reliance upon and application of *Cadillac Asphalt Paving Co.* and other Board law does not withstand precedential scrutiny.

In *Cadillac Asphalt Paving Co.*, the employer argued that it did not bear successorship bargaining obligations because its "operational changes render[ed] the prior Teamsters bargaining unit inappropriate." 349 NLRB at 9. After the employer assumed control of operations on July 1, 2003, it "did not erase or even diminish the amount of work performed by the drivers. Rather, the drivers continued to drive the same trucks to the jobsites, report to the same supervisors, and assist the same composite work crews of Laborers and Operating Engineers with cleaning, raking, shoveling, and other assorted utility functions. Their duties and immediate supervision remained the same through the end of the 2003 paving season." *Id*. This alone was sufficient for the Board to conclude that the prior bargaining unit was not inappropriate. *Id*.

However, the employer also alleged that nearly a year after it assumed operations, "certain operational changes implemented . . . altered the drivers' duties sufficiently to establish that a separate unit for drivers was no longer appropriate." *Cadillac Asphalt Paving Co.*, 349 NLRB at 9. The Board rejected this argument, finding these purported changes irrelevant because "it is well established that the continued appropriateness of a bargaining unit for successorship purposes is measured at the time the bargaining obligation attaches." *Id*. In support of this statement, the Board indirectly relied upon *Banknote Corp. of Am.*, 315 NLRB 1041 (1994). In that case, the Board concluded that the employer had "not sustained its burden of showing that the Charging Parties' historical units no longer are appropriate separate units." *Id*. at 43. This result obtained due to the employer presenting only "sketchy testimony of . . . six employees . . . as well as several inconclusive documents purporting to show the switch in job duties." *Id*. The Board further found

such evidence insufficient because "many of the changes in duties relied upon by the [employer] actually occurred after the bargaining obligation attached." *Id*.

Thus, neither *Cadillac Asphalt Paving Co.* nor *Banknote Corp. of America* create a bright-line rule that changes in the bargaining unit occurring after the bargaining obligation attached are irrelevant. At best, both cases instead stand for the proposition that changes "that occurred when and before the bargaining obligation attached as opposed to actions taken by the [employer] at a point in time after its bargaining obligation matured . . . are of significant importance." *Pioneer Concrete of Arkansas, Inc.*, 327 NLRB 333, 335 (1998). Indeed, in *Pioneer Concrete of Arkansas*, the only changes the employer made were "common uniforms for all employees, safety equipment for all employees and the [change in] designation of equipment[.]" *Id*. at 336. These changes were insufficient to render the bargaining units "inappropriate." *Id*. at 336.

If anything, *Cadillac Asphalt Paving Co.*, *Banknote Corp. of America*, and *Pioneer Concrete of Arkansas* demonstrate that the Board has not established a firm rule that *any* significant operational and structural changes implemented by the employer after a bargaining demand cannot be considered in determining whether a prior bargaining unit is inappropriate. Rather, these cases stand for the notion that a successor's purported changes should be accorded *de minimis* weight when they are otherwise non-operational or inadequate in nature. Again, as the D.C. Circuit held in *Deferiet Paper Co.*, "both pre-acquisition and post-acquisition changes in plant operation" remain germane considerations in determining whether a historical bargaining unit is no longer appropriate for successorship purposes. 235 F.3d at 584. Board precedent bears this principle out.

Weighing the substance of pre-acquisition and post-acquisition changes conforms with the Board's holding in *Indianapolis Mack Sales and Service, Inc.*, that "either before or after the [successor's] takeover" of a business, there was sufficient evidence "which overcame the claim"

that a prior unit remained historically appropriate post-takeover. 288 NLRB at 1127. In other words, "post-acquisition changes" alone were sufficient to determine whether a bargaining unit remained appropriate such that a successor was obligated to bargain with it. Specifically, "[s]ince the takeover," the employer "introduced new practices that strengthen[ed] the mutual interests of" the prior bargaining units which the successor combined into a single unit. *Id*. This resulted in "interaction between" these employees which "occur[red] with even greater frequency under [the successor's] administration than under the predecessors." *Id*. Additionally, "[a]part from their functional integration," these employees had "significant interchange through other means: they work in adjacent sections of the same building, eat lunch together, use a single locker room, the same parking area, and common entrances." *Id*.

Regardless of the evidentiary weight by way of Stein's conduct that rendered the truckdrivers unit no longer appropriate, it may be considered in the first place because it was not the result of any unfair labor practices committed by Stein. By contrast, the ALJ concluded that because Stein's "cross-training and assignment of cross-jurisdictional work" stemmed from unlawful unilateral changes to terms and conditions of employment, such evidence could not be considered in determining whether the truckdrivers unit remained appropriate. (ALJ Dec., p. 18.) However, this conclusion turns on whether Stein forfeited its rights to set initial terms and conditions of employment under *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997). As explained *infra*, Stein did not. Since no such forfeiture occurred, then Stein's changes to terms and conditions of employment cannot be construed as unilateral. *See Pressroom Cleaners, Inc.*, 361 NLRB 643, 643 (2014). (because, in cases of forfeiture, the successor must "continue[] the predecessor's terms and conditions of employment," any changes by the successor are "unilateral"). Accordingly, Stein's pre- and post-commencement actions may be considered in

determining the continuing viability of the truckdrivers unit because they were not the product of unlawful employer conduct.

C. Respondents were permitted to lawfully recognize, bargain, and maintain a CBA with each other because Stein was not obligated to recognize or bargain with Teamsters Local 100 as a *Burns* successor. [Exception Nos. 15-22.]

Where "a majority of [the successor's] work force who were hired . . . had previously been employed by [the predecessor], but "a majority of those people had not in fact, been represented by [the charging party union]," there can be "no continuity of representation when these [successor] employees, even those who had previously been employed by [the predecessor], went from [the predecessor] to [the successor]." *R&S Waste Servs., LLC*, 362 NLRB No. 61, slip op. at 31-32 (2015), *enfd.*, 651 Fed. Appx. 34 (2d Cir. 2016). As such, the successor is not "a successor within the meaning of *Burns*[.]" *Id.*

As established *supra*, the truckdrivers unit was not appropriate for determining whether Stein had any bargaining obligations to them. Thus, under *R&S Waste Servs.*, the only remaining calculus is whether Stein had any obligation to bargain with Teamsters Local 100 because the employees it formerly represented constituted the majority of Stein's entire work force. If anything, the Charging Party's relationship with TMS resembled 8(f) collective-bargaining relationships between unions and predecessor employers. *Davenport Insulation, Inc.*, 184 NLRB 908, 908 (1970). In *Davenport Insulation*, a predecessor employer was signatory to an 8(f) agreement with the Carpenters. *Id.* However, the successor employer refused to bargain with the Carpenters during the life of the contract after assuming control of its predecessor's operations. *Id.* at 910. Accused by the General Counsel of violating Section 8(a)(5), the Board ultimately concluded that the employer did not fall afoul of the Act. Specifically, it held "that where, as here, a contract with the predecessor employer has been entered into pursuant to Section 8(f), no duty is

imposed upon the successor employer to honor its predecessor's bargaining obligation unless there is *independent proof of the union's actual majority* and of the successor employer's unlawful refusal to bargain." *Id*. at 908. (Emphasis added.) Because "the uncontroverted evidence in [that] case reveal[ed] that the [Union] at no time represented a majority of employees employed by [the successor employer]," the Board could "not require [the successor employer] to bargain with the Union or to assume and be bound by the contract between [the Union] and the [predecessor employer]." *Id*.

Here, Teamsters Local 100 would not have "represented a majority of employees employed by" successor Stein. *Davenport Insulation,* 184 NLRB at 908. Instead, of all the former TMS employees Stein retained upon assuming operations, 36 were Local 18 members, 8 were Teamsters Local 100 members, and 11 were Laborers' Local 534 members. (TR 1009-10; L18 Exh. 3; Jt. Exh. 1, ¶ 23.) Indeed, throughout 2017, of the 71 total individuals employed by TMS, 42 – a majority – were represented by Local 18. (Jt. Exh. 1, ¶¶ 17-29.) Local 18 thus represented a majority of Stein's employees within the appropriate wall-to-wall bargaining unit when Stein first put out a bid for the Middletown Facility, continuing to when Local 18 and Stein first started negotiating for a CBA in October of 2017, and leading up to January of 2018, when a majority of the employees retained were represented by Local 18 through uncoerced majority support. The Union provided confirmation of uncoerced majority support in October 2017 when it represented to Stein that it represented a majority of the employees performing work at the Middletown Fafciliy, by and through authorization cards, signed no later than August 2017 (TR 186, 1006; L18 Exh. 3), and later presented said authorization cards to Stein for its inspection and approval in early January 2018. (TR 1009-10; L18 Exh. 3.) Accordingly, Stein was not obligated to bargain with

Teamsters Local 100 nor assume and be bound by its CBA with TMS, and therefore it did not violate Section 8(a)(5) of the Act. *Davenport Insulation* at 908.

Because Stein did not violate Section 8(a)(5) of the Act, it follows that Local 18 cannot have violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by accepting recognition from Stein as bargaining representative of the employees in the truckdrivers unit. Where authorization cards are "not tainted" with employer assistance, if they demonstrate majority support for a union, that union "represent[s] an uncoerced majority of the employees on [the date] when [the employer] extend[s] 9(a) recognition to the [union.]" *Garner/Morrison, LLC*, 366 NLRB No. 184, slip op. at 4 (2018). In the instant matter, when Stein extended 9(a) recognition to Local 18, the record evidence demonstrates that the Union represented an uncoerced majority of its employees. Stein's conduct was predicated on its inspection of Local 18's authorization cards from the Middletown Facility. (TR 1009-10; L18 Exh. 3.) These cards were signed by Stein employees and dated no later than August 2017. (TR 186, 1006; L18 Exh. 3.) These cards were thus procured well in advance of any coercive conduct averred by the General Counsel; *to wit*, that Local 18 allegedly: 1) told non-members in *January and February 2018* that if they failed to sign membership applications and check-off authorizations on behalf of Local 18, they would be removed from the work schedule (Teamsters Comp. at ¶¶ 18-19); and 2) received assistance and support from Stein which allowed the distribution of Local 18's membership applications and check-off authorizations to non-members. (Teamsters Comp. at ¶ 17; Laborers Comp. at ¶ 17.) Under these circumstances, because there is "no evidence whatsoever to indicate that the [employer] gave any assistance to [the union] in this respect or that the Union resorted to any coercive tactics in obtaining the same," Local 18 "did in fact represent a majority of the employees" that was uncoerced at the time it presented its

authorization cards to Stein. *Roegelein Provision Co.*, 99 NLRB 830, 842 (1952). As such, the Section 8(a)(2) and 8(b)(1)(A) charges should be dismissed. *Garner/Morrison, LLC*, slip op. at 4.

D. Stein did not commit any unfair labor practices under *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997), and thus did not forfeit its rights to set terms and conditions of employment. [Exception Nos. 23-26.]

The ALJ found that certain conduct committed by Stein violated Sections 8(a)(1) and (2) of the Act and was thus actionable pursuant to his asserted proposition "that a successor may forfeit its right to unilaterally set initial terms and conditions of employment by engaging in concomitant unfair labor practices." (ALJ Dec., p. 23.) Specifically, the ALJ agreed with the General Counsel that Stein's conduct, as a result, ran afoul of that proscribed in *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997). However, the ALJ's conclusion misapprehends the forfeiture principle generally and stretches *Advanced Stretchforming* to its breaking point. Other than being a perfectly clear *Burns* successor – which the ALJ agreed Stein is not (ALJ Dec., p. 22) – the only ways in which Stein might forfeit its right to set terms and conditions of employment is if it either "unlawfully refuses to hire its predecessor's employees" or hires a majority of its predecessor's employees, but does so "utilizing an unlawful purpose," in that it tells the employees "it would not recognize the union" that represented them under the predecessor. *Adams & Assocs., Inc.*, 363 NLRB No. 193, slip op. at 21 (2016). This type of unlawful forfeiture only obtains *assuming* the unit at issue "remained an appropriate unit, and there was substantial continuity between" the predecessor and the successor. *Planned Bldg. Servs., Inc.*, 365 NLRB No. 162, slip op. at 1, fn. 4 (2017).

The ALJ cited to a number of Board decisions where the employer engaged in unlawful hiring practices in order to avoid employing a work force with a majority represented by the

charging party union[11] or unlawfully informed the employees it would not recognize their bargaining representative under the predecessor.[12] (ALJ Dec., p. 23). Notwithstanding the ALJ's reference to Board precedent of the forfeiture doctrine, his application of the same is flawed in three fundamental respects.

First, Stein's bargaining rights cannot be forfeited because it had no underlying obligation to bargain with the Charging Parties as: 1) their collective-bargaining relationship with TMS was not predicated on Section 9(a) of the Act, thus no presumption of majority status flowed from these relationships; and 2) their units were not appropriate under Stein's planned (and effectuated) operational and functional changes to its workforce.[13] Indeed, as to the latter point, "[a] necessary predicate for imposing the duty to bargain is the retention of the predecessor's employees and the continued appropriateness of the unit." *Armco, Inc.*, 279 NLRB 1184, 1213 (1986). Likewise, Section 8(a)(2) and Section 8(b)(1)(A) violations will only arise when "when the employer renders unlawful assistance in establishing the unions majority, [resulting in] recognition and acceptance thereof," provided that "the union does not represent a majority of employees in an *appropriate unit*." *Lowe's Market, Inc.*, 311 NLRB 1281, 1285 (1993). (Emphasis added.) Yet in a "particular factual situation [where] a . . . bargaining unit . . . is not appropriate," then it follows that there can be no Section 8(a)(2) violation. *See Sav-On Drugs, Inc.*, 267 NLRB 639, 644 (1983). At bottom, a Section 8(a)(2) violation only attaches when an employer accords recognition or executes a CBA with a minority union "at a time when it was under obligation to bargain with the duly designated

[11] *Galloway Sch. Lines, Inc.*, 321 NLRB 1422 (1996); *U.S. Marine Corp.*, 293 NLRB 669 (1989); *Shortway Suburban Lines*, 286 NLRB 232 (1987); *State Distributing Co.*, 282 NLRB 1048 (1987); and *Love's Barbeque Restaurant*, 245 NLRB 78 (1979).
[12] *Smoke House Restaurant*, 347 NLRB 192 (2006) and *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997).
[13] Local 18's arguments on the first and second points are established in Secs. III(A) and (B), of the instant brief, respectively.

majority representative in the appropriate unit[.]" *Eastern Mass. St. Ry.*, 110 NLRB 1963, 1967 (1954). Because there was no such obligation in this case, Stein did not violate Section 8(a)(2).

Second, Stein's conduct does not specifically run afoul of the forfeiture doctrine. The Board's restrictive application of this principle is made apparent in situations where the Board has actually found both a forfeiture of successor's bargaining rights and independent Section 8(a)(2) violations. Thus, in *New Concept Solutions*, 349 NLRB 1136 (2007), the Board concluded that a successor employer violated Section 8(a)(2) by unlawfully recognizing a union even though another union continued its majority representation of the employees at issue. *Id.* at 1157. Regardless, citing *Advanced Stretchforming*, the Board *only* premised its finding that the employer forfeited its bargaining rights on the basis of "reducing pay, benefits, and terms and conditions of employment," in violation of Section 8(a)(5). *Id.*, fn. 44. Similarly, in *Emerald Green Bldg. Servs., LLC*, 364 NLRB No. 109 (2016), the Board agreed with the ALJ that the successor employer committed Section 8(a)(2) violations, but subsequently held that a successor employer forfeited its bargaining rights *solely* "by unilaterally changing employees' terms and conditions of employment" in violation of Sections 8(a)(1) and (5). *Id.*, slip op. at 1, fn. 1, citing *Love's Barbeque Restaurant*, 245 NLRB 78 (1979). Effectively, the Board has refused to find that an employer will forfeit its bargaining rights unless there is a Section 8(a)(5) violation as prescribed by either *Advanced Stretchforming* or *Love's Barbeque Restaurant*. Neither the ALJ has found nor has the General Counsel alleged that Stein engaged in unlawful hiring practices to avoid hiring a majority of the predecessor employees or informed these employees that Stein would operate non-union. These are the only two circumstances that precipitate forfeiture, and because both of them are absent in this case, Stein cannot be deemed to have lost its bargaining rights as a successor.

Third, even assuming *arguendo* that Stein made actionable threats, the Board has held that if such a "statement was made at a time when the [employer] had no obligation to recognize and bargain with the Union," even as late as "at least one week before" the successor would have any obligation to recognize the union under *Burns*, the employer's conduct does not independently violate the Act. *Eastern Essential Servs.*, 363 NLRB No. 176, slip op. at 11 (2016). Here, the ALJ points to statements by Stein on November 9, 2017 that he believed was actionable under *Advanced Stretchforming*. (ALJ Dec., p. 24.) However, to the extent these statements could even implicate Stein, they were uttered well before Stein would have been obligated to bargain with the Charging Parties. As such, they do not constitute independent violations of Sections 8(a)(1) or (5) of the Act. *Id*.

E. Stein did not violate Sections 8(a)(1) and (5) of the Act by failing to maintain the most recent Teamsters Local 100-TMS CBA or unilaterally changing mandatory subjects of bargaining because Stein did not forfeit its rights to set terms and conditions of employment. [Exception Nos. 27-28.]

The ALJ's conclusion that Stein unilaterally modified mandatory subjects of bargaining is entirely reliant on the logical predicate that Stein was obligated to maintain the terms and conditions of the Charging Party's most recent CBA with TMS because Stein had forfeited its right to set these terms and conditions initially under *Advanced Stretchforming Internatl.*. However, if no such forfeiture occurred, then Stein's conduct is not unilateral. *See Pressroom Cleaners, Inc.*, 361 NLRB at 643. Thus, as demonstrated *supra*, because Stein's conduct did not rise to an actionable level of forfeiture under Board precedent, any modifications it may have made to the terms and conditions of employees in the former truckdrivers unit are not unlawfully unilateral.

F. Stein did not engage in unlawful assistance or threats under Sections 8(a)(1) and 8(a)(2) of the Act nor did Local 18 engage in unlawful threats or distribution of membership applications and dues-checkoff authorization cards under Section 8(b)(1)(A) of the Act because Stein was not a *Burns* successor to TMS. [Exception Nos. 3, 29-33.]

As the ALJ noted, an employer's threats to employees if they fail to join a union and assistance to that union violate Sections 8(a)(1) and (2) of the Act if, and only if, the union "does not represent an uncoerced majority of the unit employees." (ALJ Dec., p. 25.) The ALJ likewise acknowledged that Local 18's threats and distribution of membership documents is unlawful under Section 8(b)(1)(A) of the Act provided that the union "lacks majority support among the unit employees[.]" (*Id*. at p. 26.) However, these conclusions necessarily require a determination as to what constitutes the appropriate unit. In this matter, the ALJ stated that the "drivers unit" remained the appropriate unit for determining whether these violations attached. (*Id*.) Yet this result cannot obtain if the unit no longer remains appropriate. As amply demonstrated *supra*, Local 18 has made such a showing. Namely, the only appropriate unit is one in which there is majority support for Local 18. As such, Stein retained no obligation to bargain with Teamsters Local 100.

Regardless, the record does not bear out the necessary facts to establish that neither Local 18 nor Stein could have engaged in any such unlawful threats. Stein employee Gary Wise claimed that he met Local 18 official Justin Gabbard at an unidentified date shortly after January 1, 2018, at the Union's District 3 Union Hall, where he had arrived to complete his membership paperwork. (TR 534-35.) Mr. Wise subsequently contended that during this time, Mr. Gabbard informed him that if he failed timely to fill out the paperwork "they'll take you off the schedule and make you leave the site." (TR 537.) There was no further testimony elicited to clarify who "they" referred to, or to otherwise corroborate Mr. Wise's testimony. In any event, even if Mr. Wise was referring to Stein, this cannot constitute a threat from Local 18. Mr. Gabbard did not "endors[e] or condemn[]" any actions Stein might take, but simply "functioned as a conduit for relaying"

information. *See George Williams Sheet Metal Co.*, 201 NLRB 1050, 1055 (1973). In other words, Mr. Gabbard was simply passing on information he had heard. And rightfully so, because Stein and Local 18 were lawfully entered into a CBA with an appropriate unit for purposes of collective bargaining. Under these circumstances, Stein's communication simply constitutes "a statement of position . . . [Stein] had the right to take[.]" *Anaconda Copper Mining Co.*, 110 NLRB 1925, 1929 (1954). Tellingly, the General Counsel did not put Mr. Gabbard on the stand to clarify this hearsay testimony. As rebuttal, Richard Dalton, Local 18's Business Manager (TR 681), stated that Local 18 has never threatened an employee with loss of work if the employee failed to complete requisite membership paperwork and become a dues-paying member within the 30-day period of the CBA's union security clause. (TR 700-01; *See* Jt. Exh. 16, Sec. 5.01.) Moreover, Mr. Dalton made clear that Local 18 has no power to make such threats or exercise any such scheduling discretion. (*Id*.) And both on direct- and cross-examination, Mr. Dalton emphasized that following Stein's assumption of work at the Middletown Facility, Local 18 was attempting to ease the membership process as much as possible for new members by relaxing enforcement of the 30-day union security clause. (TR 712, 722-23.)

IV. Conclusion

The record in this case definitively establishes that Stein was not a *Burns* successor when it assumed operations at the Middletown Facility on January 1, 2018. Accordingly, it was not obligated to recognize and bargain with Teamsters Local 100. From these conclusions, it naturally follows that neither Local 18 nor Stein have committed any of the ULPs alleged by the General Counsel because they are wholly dependent on the now-disproven predicate that the truckdrivers unit under TMS remained appropriate under Stein. Local 18 therefore excepts to the ALJ's

Remedy and Order (ALJ Dec., pp. 28-32), and respectfully requests that the ALJ's Decision finding that Respondents have violated the Act be abrogated in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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